APPENDIX A

[Filed Aug. 18, 1994]

Second Appellate District, Division One, No. B070030
B070031/B071799/B072863/B079046
S040439

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUNBURST BANK,
Appellant

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Respondents

AND COMPANION CASES

Petition for review DENIED.

/s/ Lucas
Chief Justice

APPENDIX B

[Filed May 4, 1994]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B070030
(Super.Ct.No. BC033211)

SUNBURST BANK,
Plaintiff and Appellant,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Defendants and Respondents.

B070031
(Super.Ct.No. BC037933)

NATIONSBANK OF TEXAS,
Plaintiff and Appellant,

v.

EXECUTIVE LIFE INSURANCE COMPANY, *et al.*,
Defendants and Respondents.

B071799, B072863, B079406
(Super.Ct.No. BS006912)

JOHN GARAMENDI, As Insurance Commissioner, etc.,
Plaintiff,

v.

EXECUTIVE LIFE INSURANCE COMPANY,
Defendant.

APPEALS from judgments of the Superior Court of Los Angeles County, Kurt J. Lewin, Judge. Dismissed in part; affirmed in part.

Daniel & Lezar, Robert D. Daniel, and Peveril O. Settle III, for Plaintiff and Appellant NationsBank of Texas, N.A.

Crosby, Heafey, Roach & May, Peter W. Davis, Paul D. Fogel, and Marc R. Benson, for Plaintiffs and Appellants Sunburst Bank and NationsBank of Texas, N.A.

Phelps Dunbar, Michael D. Hunt, and Allen D. Darden, for Plaintiff and Appellant Sunburst Bank.

Cook, Yancey, King & Galloway, Herschel E. Richard, Jr., Glenn L. Langley, and William C. Kalmbach III; Murphy, Weir & Butler, Penn Ayers Butler, and Tobias S. Keller, for Respondents Commercial National Bank in Shreveport, First Tennessee Bank National Association, First Interstate Bank of Denver, N.A., Norwest Bank, Minnesota, N.A., and Texas Commerce Bank, El Paso, N.A.

Pachulski, Stang, Ziehl & Young, Thomas E. Musselman, Iain A. W. Nasatir and Larry W. Gabriel, for Respondents Group Annuity Participant Protection Association, State Street Bank & Trust Company, Underwriters Laboratories, Inc., Chelsea Industries, Inc., and British Gas Exploration Production, Inc.

Brobeck, Phleger & Harrison, G. Larry Engel, Kent M. Roger, Esther H. Pang and David M. Higgins, for Respondents CoCARE and The Official Allocated Annuities Committee.

Daniel Lungren, Attorney General, and Edmond B. Mamer, Deputy Attorney General; Rubinstein & Perry, Karl L. Rubinstein, Dana Carli Brooks, Melissa S. Kooistra, and Robert H. Nunnally, Jr., for Insurance Commissioner of the State of California.

Executive Life Insurance Company (ELIC) sold Municipal Bond Guaranteed Investment Contracts (Muni-GICs) to two banks. When the banks failed, the Federal Deposit Insurance Corporation (FDIC) placed them in receiverships and transferred their assets (including the ELIC Muni-GICs) to successor banks which, in turn, became creditors in ELIC's subsequent conservatorship proceedings. To obtain priority over other claimants, the banks contend their ephemeral involvement with the FDIC clothed them with the aura of a governmental entity. The trial court disagreed and so do we.

FACTS

In 1986, InterFirst Bank Houston, N.A. (a Texas bank) and Capital Bank & Trust Co. (a Louisiana bank), as trustees acting for the benefit of municipal bondholders, invested funds in ELIC's Muni-GICs. InterFirst invested about $295 million and Capital invested about $150 million.[1]

On October 30, 1987, by court order, Capital was declared insolvent and placed in receivership by the

[1] Under separate trust indenture agreements, InterFirst and Capital were the trustees for funds obtained from the sale of municipal bonds, the proceeds of which were to be used to finance low-income housing (for InterFirst's beneficiary, The Southeast Texas Housing Finance Corporation, SETHFCO) and agricultural loans (for Capital's beneficiary, the Louisiana Agricultural Finance Authority, LAFA). Under the indenture agreements (which are contracts between the municipal bond issuers and their indenture trustee-banks), the trustees were expressly obligated to purchase one or more ELIC Muni-GICs. In 1986, ELIC issued eight Muni-GICs (only three are involved in this case), for a total consideration of about $1.8 billion. The Muni-GICs required ELIC to make specified interest payments and permitted the trustees to withdraw accumulated interest (which could then be used to service the debt on the bonds and to finance the low-income housing and agricultural loans). At maturity, ELIC was to return to the trustees their initial investments and any unpaid interest. SETHFCO and LAFA were third-party beneficiaries of the Muni-GICs which are the subject of these proceedings.

FDIC. That same day, the FDIC organized a "bridge bank," Capital Bank & Trust Co., N.A. (CBTNA).[2] CBTNA, in turn, entered into a purchase and assumption agreement, pursuant to which Capital's trust business was transferred to CBTNA by the receiver (the FDIC), which made CBTNA the successor trustee under the LAFA trust indenture and the holder of the ELIC Muni-GICs. On May 23, 1988, Grenada Sunburst System Corporation acquired CBTNA pursuant to an agreement which resulted in the merger of CBTNA and Sunburst Bank, a wholly-owned subsidiary of Grenada. To induce the merger and the transfer of CBTNA's trust assets (including the ELIC Muni-GICs) to Sunburst, the FDIC indemnified Sunburst for all losses arising from the acquisition agreement, including any claims by Capital's creditors. Since that time, Sunburst has served as the successor trustee of LAFA's ELIC Muni-GICs.

Meanwhile, during June 1987, InterFirst merged with First RepublicBank of Houston, N.A. On July 29, 1988, by court order, RepublicBank was placed in FDIC receivership. The same day, pursuant to a purchase and assumption agreement, the FDIC (as receiver) transferred some of RepublicBank's assets and trust business (including the ELIC Muni-GICs) to JRB Bank, N.A., a bridge bank created by the FDIC for that purpose. The bridge bank became the successor trustee under the SETHFCO trust indenture and the holder of the ELIC Muni-GICs. Later the same day, the FDIC accepted the bid of NCNB Corporation to purchase the bridge bank's stock. To induce NCNB to make the purchase, the FDIC promised financial assistance to NCNB and its affiliates and, as part of that assistance, agreed to indemnify NCNB Texas National Bank—the renamed bridge bank—against any losses, liabilities or expenses it might later incur in

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[2] The FDIC is authorized by statute to establish a "bridge bank" to take over the assets and liabilities of a failed bank and to carry on its business for a limited period while an agreement is worked out with a purchasing bank. (12 U.S.C. § 1821, subd. (n).)

any proceeding as a result of the assumption. Since that time, NCNB Texas (later renamed NationsBank of Texas, N.A.) has served as the successor trustee of SETHFCO's ELIC Muni-GICs.

On April 11, 1991, the California Insurance Commissioner, acting under the authority of section 1011 of the Insurance Code,[3] asked the Los Angeles Superior Court to place ELIC into conservatorship. The unopposed request was granted, the Commissioner was named as the conservator and, among other things, a moratorium was imposed on payments to the Muni-GIC trustees. In August, the Commissioner submitted a proposed rehabilitation plan which established priorities among claimants according to a schedule which placed Muni-GICs at the bottom of the ladder (Class 6), below ELIC's non-Muni-GIC policyholders (who were placed in Class 5). (§ 1033, subd. (a).)[4] Under this proposed plan, the ELIC policies with Class 5 priority were to be transferred to the newly-

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[3] Unless otherwise stated, all section references are to the Insurance Code.

[4] Subdivision (a) of section 1033 lists the order of "[p]riorities in allowance of claims" against an insolvent insurer:

"(a) Claims allowed in [an insolvency] proceeding shall be given preference in the following order:

"(1) Expense of administration.

"(2) Unpaid charges due under provisions of Section 736 [expenses incurred by the Commissioner in examining the insurer's business and affairs].

"(3) Taxes due to the State of California.

"(4) Claims having preference by the laws of the United States and by laws of this state.

"(5) All claims of the California Insurance Guarantee Association, the California Life and Health Insurance Guarantee Association, and associations or entities performing a similar function in other states, together with claims for refund of unearned premiums and all claims of policyholders of an insolvent insurer that are not covered claims. . . .

"(6) All other claims."

created Aurora National Life Insurance Company, which would issue new policies equal to about 80 percent of the value of the original policies. ELIC annuity contracts and "Pension-GICs" (GICs issued by ELIC to employee pension funds) were given Class 5 priority.

In the fall of 1991 (while the rehabilitation plan was pending before the trial court), Sunburst and NationsBank sued ELIC and the Commissioner, seeking a declaration that their Muni-GICs were entitled to "at least" the Class 5 priority given to other annuities and Pension-GICs under the proposed rehabilitation plan. In an amended complaint, Sunburst alleged its claim was entitled to Class 4 priority—on the theory that the FDIC, as a government entity, was entitled to Class 4 priority and that, therefore, so was Sunburst because the FDIC's momentary possession of Sunburst's Muni-GICs had, by an actual or implied assignment or other alchemy, bestowed upon Sunburst the right to walk in the FDIC's shoes. Following a mid-November trial on the proposed rehabilitation plan, the trial court ruled that the Muni-GICs were entitled to Class 5 priority but postponed a ruling on Sunburst's request for Class 4 priority.

In January 1992, the Commissioner submitted a revised rehabilitation plan which, in conformance with the trial court's ruling, included the Muni-GICs in Class 5. Under this plan, all Class 5 claimants would receive about 70 percent of the value of their claims (as opposed to the 80 percent contemplated under the original plan). (See *Texas Commerce Bank* v. *Garamendi* (1992) 11 Cal. App.4th 460.)

On January 10, NationsBank amended its declaratory relief complaint to assert a right to Class 4 priority for its Muni-GIC on the same theory as Sunburst and, in February, Sunburst and NationsBank moved for summary judgment. The Commissioner, several other Class 5 claimants, and the other Muni-GIC holders who had not acquired their Muni-GICs from or through the FDIC,

all opposed the motion, and the Commissioner also filed a cross-motion for summary judgment. The trial court denied the Banks' motions, granted the Commissioner's motion, and entered judgment against NationsBank and Sunburst in their declaratory relief actions, finding their Muni-GICs were not entitled to Class 4 priority. NationsBank and Sunburst appeal.[5]

DISCUSSION

NationsBank and Sunburst contend their claims are entitled to Class 4 priority because they have a preference under federal law. Although we are inclined to disagree, the point is immaterial—because even assuming the FDIC would have had a right to priority if it was a party litigant, no such right was assigned or otherwise transferred to the Banks.

Introduction

Class 4 priority is available only for those claims "having preference by the laws of the United States and by laws of this state." (§ 1033, subd. (a)(4).) To bring

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[5] On July 31, the trial court approved the revised reorganization plan and authorized the immediate transfer of assets from ELIC to Aurora. NationsBank and Sunburst also appealed from that order (No. B071799), and from a November 25 order which stands or falls with the July 31 order (No. B072863). The parties agree (and so do we) that Division Four's decision in *Commercial Nat. Bank* v. *Superior Court* (1993) 14 Cal.App.4th 393, which vacates the July 31 order, makes these other appeals moot and we therefore dismiss them on that ground, limiting our discussion on this appeal to the priority issue raised on the cross-motions for summary judgment.

Following the decision in *Commercial Nat. Bank* v. *Superior Court, supra,* 14 Cal.App.4th 393, the Commissioner proposed a new plan, which the trial court approved. The new plan was the same as the earlier plan insofar as this case is concerned (it reiterated the judgments denying Class 4 status to NationsBank and Sunburst) and, to play it safe, the Banks filed a new notice of appeal (No. B079406). The issues are the same and that appeal has therefore been consolidated with the appeals from the summary judgments.

themselves within this category, the Banks claim a preference under Title 31 U.S.C. section 3713, subdivision (a)(1), which provides (as relevant) that a "claim of the United States Government shall be paid first when . . . a person indebted to the Government is insolvent and . . . an act of bankruptcy is committed . . . ."

The Banks' syllogism is this: Federal policy promotes "a healthy and solvent national banking system," including efforts by the FDIC to protect the assets of insolvent financial institutions by encouraging asset assignments to new banks which, in turn, provide uninterrupted service to the public. Federal law (including 31 U.S.C. § 3713, subd. (a)(1)) gives the FDIC the tools to implement such transfers, by bestowing upon the FDIC "the right to assert a federal law priority in an insolvency proceeding" such as ELIC's conservatorship. California law (§ 1033, subd. (a)(4)) recognizes this right by permitting claims made under "the laws of the United States" to be paid ahead of most other claims "because claims that may affect the public fisc are entitled to satisfaction before private parties may be reimbursed." The FDIC's functions are "fundamentally governmental" and, under "settled assignment principles, NationsBank and Sunburst, the FDIC's assignees, are entitled to assert a [C]lass 4 priority as well." According to NationsBank and Sunburst, the fact that ELIC's indebtedness and "act of bankruptcy" (the conservatorship) are admitted means there are only two questions to be decided in this case—whether the FDIC is entitled to assert a federal priority and, if so, whether the Banks can do so as their assignees.

Priority

According to the Banks, the FDIC is entitled to priority because it is both (1) an "integral part of the governmental mechanism" created to accomplish something Congress deemed to be of national importance (*Small Business Adm'n.* v. *McClellan* (1960) 364 U.S. 446,

450) and (2) its activities affect the federal treasury (cf. *Federal Home Loan Mortgage Corp.* v. *Superior Court* (1990) 224 Cal.App.3d 218, 222-223). Since other "federally chartered corporations" which meet these criteria have been held to be federal agencies or instrumentalities (*Rust* v. *Johnson* (9th Cir. 1979) 597 F.2d 174, 177-178 [Federal National Mortgage Association]; *U.S.* v. *Rivieccio* (E.D.N.Y. 1987) 661 F.Supp. 281, 287-288 [National Credit Union Administration]; *Fed. Land Bank of Wichita* v. *Bd. of County Com'rs* (D. Colo. 1984) 582 F.Supp. 1507, 1511 [Federal Land Bank]), the same result should follow as to the FDIC—because the FDIC performs important governmental functions by regulating banks, insuring deposits, and minimizing the effect of bank failures on the national banking system. For these and related reasons, the Banks conclude, the FDIC is entitled to Class 4 priority.

According to the Commissioner and the other Muni-GIC owners, the Banks' argument ignores the fact that the FDIC has three distinct roles—one as regulator (12 U.S.C. § 1820, subd. (g)), one as corporate insurer of deposits (12 U.S.C. § 1811 et seq.), and one as receiver of failed banking institutions (12 U.S.C. § 1821, subd. (c).)[6] In the latter context (as in this case), the FDIC stands in the shoes of the insolvent bank (*Federal Deposit Insurance Corporation* v. *Glickman* (9th Cir. 1971) 450 F.2d 416, 418) and acquires the rights and duties of that institution (*F.D.I.C.* v. *Wheat* (5th Cir. 1992) 970 F.2d 124, 130), no more and no less. For this reason, the FDIC (wearing its receiver hat) is not a federal instrumentality for purposes of the Tax Injunction Act (28 U.S.C. § 1341, which precludes a federal court from

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[6] "The FDIC's roles as receiver and as corporate insurer are distinct. In its capacity as receiver, the FDIC is obligated to marshal the assets of the failed bank for the benefit of the bank's creditors and shareholders. In its corporate capacity, the FDIC is obligated to insure the failed bank's deposits." (*Federal Deposit Ins. Corp.* v. *Hatmaker* (6th Cir. 1985) 756 F.2d 34, 36, fn. 2.)

interfering with the collection of state taxes) or the Eleventh Amendment of the United States Constitution. (*Federal Deposit Ins. Corp.* v. *State of N.Y.* (2d Cir. 1991) 928 F.2d 56; *PIMA Financial Serv.* v. *Intermountain Home Systems* (D. Colo. 1992) 786 F.Supp. 1551, 1560-1561.) A fortiori (according to the Commissioner and the other Muni-GIC owners), the FDIC does not have a right to priority over ELIC's other policyholders—because the FDIC can have no greater rights than its assignors, Capital and RepublicBank.[7]

Having stated the issue, we move on without deciding it, leaving it to another court at another time to resolve an apparent conflict in the cases. As we will explain, the FDIC's failure to assign to the Banks any right of its own (as opposed to the rights and assets of the failed banks) defeats the contention that, assuming the FDIC

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[7] For an interesting mix of cases, see *Lapadula & Villani, Inc.* v. *United States* (S.D.N.Y. 1983) 563 F.Supp. 782, 784 [the public treasury is unaffected by the FDIC's success or failure in recovering debts owed to it as successor to the claims of a failed bank, which means the FDIC is not an integral part of the governmental mechanism but rather a separate legal entity serving essentially a proprietary rather than a sovereign function, which means it is not entitled to priority]; *PIMA Financial Serv.* v. *Intermountain Home Systems, supra,* 786 F.Supp. 1551, 1560-1561; and compare *Federal Home Loan Mortgage Corp.* v. *Superior Court, supra,* 224 Cal.App.3d at p. 224, fn. 2 [without distinguishing the FDIC's separate corporate and receiver functions, Division Seven of our court suggested, in dicta, that the FDIC's actions always affect the public fisc]; *Engleman* v. *Commodity Credit Corp.* (S.D. Cal. 1952) 107 F.Supp. 930, 932-936 [interpreting an earlier version of the priority statute to require the simultaneous occurrence of the elements of 31 U.S.C. § 3713, an (1) insolvent person who (2) is indebted to the government (3) commits an act of bankruptcy]; *In re Big 'D'iscount Stores, Ltd.* (Bankr. D.S.C. 1976) 2 Bankr. Ct. Dec. 1073 [the FDIC, while serving as receiver, was nevertheless acting in its "separate corporate capacity" when it purchased (for itself, not through a bridge bank) an asset of a failed bank]; see also 12 U.S.C. § 1821, subd. (n)(6)(A) [a bridge bank is not an agency, establishment or instrumentality of the United States].)

would itself have had a right to priority in this case, any such right was transferred to NationsBank or Sunburst.

Assignment

Assuming for discussion that the FDIC could, in this litigation, assert a claim to federal priority on its own behalf, no such right was assigned or otherwise transferred to the Banks.[8]

As to both NationsBank and Sunburst, the purchase and assumption agreements provided, in identical language, that: "The Assuming Bank hereby accepts from

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[8] Implicit in the Banks' assignment argument is their assumption that a governmental entity's priority rights are assignable. Our rejection of the Banks' ultimate conclusion (by our holding that there was no assignment) does not include our acceptance of this underlying hypotheses. All we have done is cut to the chase. (See *I.C. Herman & Co., Inc.* v. *Taub, Hummel & Schnall, Inc.* (2d Cir. 1974) 497 F.2d 1301, 1302 [in bankruptcy proceedings, a customs broker who advances customs duties for an importer is not entitled to succeed to the rights of the United States against the bankrupt importer, and the broker thus cannot assert the government's right to have its claim accorded priority status in the distribution of the bankrupt's estate]; *White* v. *Moriarty* (1993) 15 Cal.App.4th 1290, 1298 [an assignee of the FDIC is entitled to the benefit of the federal statute of limitations when it enforces a failed bank's note].) While the customs case is factually distinguishable because it does not involve an assignment, the limitations case is equally distinguishable (or more so). The availability of a longer period of limitations in an action between an assignee of an insolvent bank and a debtor of the same bank does no more than extend the period during which those parties can litigate their rights vis-á-vis each other. There are miles to go before reaching the Banks' conclusion, which would permit the assignee of a failed bank to claim priority in an action involving parties who had no relationship at all with the failed bank and who, by pure chance, are attempting to collect from the same third party debtor as the Banks. (See also *S.E.C.* v. *Albert & Maguire Sec. Co., Inc.* (3d Cir. 1977) 560 F.2d 569, 573 [bank receiving assignment of customer's priority claim in Securities Investor Protection Act liquidation could not assume preferred status because it would result in an "inequitable distribution" of the estate].)

the Receiver an assignment of, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the Receiver *in and to all of the following assets of the* [*Failed*] *Bank* . . . ." (Emphasis added.) The listed assets included the failed banks' "trust business" and the trust business, in turn, included the ELIC Muni-GICs. More specifically, each agreement provided, "with Respect to Trust Business," that the "Assuming Bank shall . . . succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the [Failed] Bank . . ., *all to the same extent as though the Assuming Bank had originally assumed the same* . . . ." (Emphasis added.) In neither agreement is there an assignment of *anything* belonging to the FDIC.

These agreements did not confer on NationsBank or Sunburst any claim of priority the FDIC might have had. While no particular form of assignment is required, it is essential to the assignment of a right that the assignor manifest an intention to transfer the right. (Rest.2d Contracts, § 324; *Cockerell* v. *Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291.) Nothing in the purchase and assumption agreements establishes or even suggests an intent by the FDIC to assign to the Banks a right belonging to the FDIC qua FDIC. Quite the opposite intent is manifested by the provision that the assignment of the failed bank's trust assets was made "to the same extent as though" NationsBank and Sunburst "had originally assumed" those assets from the failed banks, without any involvement by the FDIC. (Rest.2d Contracts, § 203, subd. (c) ["specific terms and exact terms are given greater weight than general language]; *Furtado* v. *Metropolitan Life Ins. Co.* (1976) 60 Cal.App.3d 17, 25.)

The Banks' reliance on *D'Oench, Duhme & Co.* v. *F.D.I.C.* (1942) 315 U.S. 447, is misplaced. In *D'Oench, Duhme,* the Supreme Court created a rule of estoppel to

prevent a failed bank's borrowers from asserting against the FDIC and its assignees a defense based upon a secret or unrecorded agreement, on the theory that the FDIC must be able to value a failed bank by reference to its books and records, free from concerns about undisclosed side deals. (See *Bell & Murphy & Assoc.* v. *InterFirst Bank Gateway* (5th Cir. 1990) 894 F.2d 750, 754.) The *D'Oench, Duhme* doctrine (now codified in 12 U.S.C. § 1823, subd. (e)) may bar many claims and defenses which would defeat or diminish the FDIC's rights in and to an acquired asset, and it may sometimes be extended to benefit the FDIC's assignees (*Cadle Co. II, Inc.* v. *Lewis* (Kan. 1993) 864 P.2d 718, 720-721). But the doctrine has never been applied in the manner suggested by NationsBank and Sunburst, which would create an implied assignment bestowing upon an assignee of the FDIC a governmental priority over other claimants. (Compare *White* v. *Moriarty, supra,* 15 Cal.App.4th at pp. 1297-1298 [following the federal cases which have implied an assignment of the FDIC's right to a six year period of limitations without discussion of the terms of the parties' purchase and assignment agreement].) Since the parties have demonstrated their ability to draft an assignment with specificity, and since the equities of this case do not favor a finding of implied assignment, we decline the Banks' invitation to extend the *D'Oench, Duhme* doctrine.

In short, the fleeting presence of the FDIC in the chain of possession of the Muni-GICs now owned by NationsBank and Sunburst did not transmogrify the Banks' claims into claims of the United States government.[9]

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[9] The fact that the FDIC indemnified NationsBank and Sunburst against the claims of their predecessors' creditors adds nothing. An agreement to indemnify is not an assignment of a right. For this reason, we deny the Banks' request that we judicially notice documents from other lawsuits in which the FDIC apparently has agreed to contribute to obligations otherwise payable (if at all) by NationsBank and Sunburst. Aside from the fact

DISPOSITION

The appeals from the July 31, 1992, and November 25, 1992, orders (Nos. B071799 and B072863) are dismissed. The judgments denying Class 4 priority to the claims made by NationsBank and Sunburst (Nos. B070030 and B070031) and the subsequent order incorporating those judgments (No. B079406) are affirmed.

CERTIFIED FOR PUBLICATION.

VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

MASTERSON, J.

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that these documents were not before the trial court and thus ought not to be considered by us (*Carleton* v. *Tortosa* (1993) 14 Cal.App.4th 745, 753-754, fn. 1), they are irrelevant.

APPENDIX C

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, Clerk

Division: 1 Date: 05/27/94

Crosby, Heafey, Roach & Way
Paul D. Fogel
1999 Harrison Street
Oakland, CA. 94612

RE: Sunburst Bank
vs.
Executive Life Insurance Company
Garamendi, John (Insurance Commissioner)
2 Civil B070030
Los Angeles NO. BC033211

THE COURT:

Petition for rehearing denied.

APPENDIX D

DEPT. 67

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

April 29, 1992

HONORABLE KURT J. LEWIN, Judge

BC 037 933

NATIONSBANK OF TEXAS, N.A.,
a national banking association

vs.

EXECUTIVE LIFE INSURANCE COMPANY,
a California Corporation,
JOHN GARAMENDI, as Insurance Commissioner

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MOTION

ON THE MOTIONS FOR SUMMARY JUDGMENT BROUGHT BY PLAINTIFF AND DEFENDANT RESPECTIVELY, HERETOFORE ARGUED AND SUBMITTED; THE COURT NOW RULES AS FOLLOWS:

RULING ON SUBMITTED MATTER

Plaintiff NationsBank of Texas has failed to establish a priority under *31 United States Code § 3717*. NationsBank's claim is not a claim of the United States and was not transmogrified into such by the FDIC's intervention.

Plaintiff was unable to designate any authority to that effect throughout the voluminous appendix of non-California authority submitted.

Counsel for plaintiff also acknowledged, even asserted, that it had no exposure to the individual bondholders for any shortfall in the amounts claimed under the GIC securing the payment and redemption of the bonds. Plaintiff was at all times and remains a conduit for the bondholders who are the real parties in interest.

For the forgoing reasons and the Court's reasoning articulated at the hearing on the motion, and for the reasons more particularly set out in the defendant Commissioner's Memorandum of Points and Authorities Plaintiff's Motion for Summary Judgment is denied and the defendant's Motion for Summary Judgment is granted.

Counsel for defendant is ordered to prepare, serve and submit a proposed Judgment consistent with this Ruling.

A COPY OF THIS MINUTE ORDER IS MAILED THIS DATE BY U.S. MAIL ON ALL APPEARING COUNSEL.

APPENDIX E

[Filed Jun. 11, 1992]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

No. BC037933

NATIONSBANK OF TEXAS, N.A.,
a national banking association,
Plaintiff,

vs.

EXECUTIVE LIFE INSURANCE COMPANY, a California corporation, and JOHN GARAMENDI, as Insurance Commissioner of the State of California,
Defendants.

JUDGMENT

This case having come on for trial on September 30, 1991, the Honorable Kurt J. Lewin, sitting without a jury, presiding; plaintiff NationsBank of Texas, N.A., f/k/a NCNB Texas National Bank, having appeared through its counsel, Pillsbury Madison & Sutro and Daniel & Lezar; defendants Executive Life Insurance Company and John Garamendi, as Insurance Commissioner of the State of California, having appeared through their counsel, the Attorney General of the State of California and Rubinstein & Perry; intervenor Xerox Corporation, as Plan Sponsor of Xerox Corporation Profit Sharing and Savings Plan, having appeared through its counsel, Barger & Wolen and Buchalter, Nemer, Fields & Younger; intervenors State Street Bank & Trust Company, Underwriters Laboratories, Inc., British Gas Exploration and Produc-

tion, Inc. and Chelsea Industries having appeared through their counsel, Buchalter, Nemer, Fields & Younger; the Official Allocated Annuities Committee having appeared through its counsel, Brobeck, Phleger & Harrison; Certain Structured Settlement Annuitants, Michael Barr, Regelio Cruz, Lawrence DeBurr, James C. Johnson, Michael Wayne Puente, Lois Moore, Clay Robbins, Margie Johnson, Laurie Rosenbaum/Richard Kissman (Cheryl Kincannon, a minor), Nancy Noret Moore and Jason Clay Moore having appeared through their counsel, Marie Collins; Janet Virgin, Timothy C. Devlin and Marie Devlin, Catholic Life Insurance Union, Medina Banking Company of Medina, Tennessee, Bank of Bolivar of Bolivar, Tennessee, Alamo Bank of Texas, San Juan State Bank and First Interstate Bank of Commerce having appeared through their counsel, Corinblit & Seltzer, Lovey Dannenberg Bemporad & Selinger and Sheinfeld, Maley & Kay; evidence, both oral and documentary, having been presented by all the parties, including the intervenors, and the cause having been argued and submitted for decision; the Court having filed its Statement of Decision on November 15, 1991; the Court having denied on January 9, 1992, the motion to vacate the Statement of Decision made by the National Organization of Life and Health Insurance Guaranty Associations, the California Life Insurance Guaranty Association, the Illinois Life and Health Insurance Guaranty Association, the Florida Life and Health Insurance Guaranty Association and the Pennsylvania Life and Health Insurance Guaranty Association, through their counsel Hopkins & Sutter and Parker, Milliken, Clark, O'Hara & Samuelian; and the Court having heard argument on April 16, 1992 on cross-motions for summary judgment on the first Cause of Action of the First Amended Complaint, and having filed its Ruling on Submitted Matter on April 29, 1992:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. For the reasons stated in this Court's November 15, 1991 Statement of Decision, the Muni GIC issued by Executive Life Insurance Company to plaintiff NationsBank of Texas (policy no. GIC 01169) is properly included in section 1033, Subd. (a)(5) as a priority 5;

2. Plaintiff NationsBank of Texas, N.A. is not entitled to a priority under 31 U.S.C. section 3713; and

3. Costs to be determined pursuant to court order.

Date: Jun. 11, 1992.

/s/ Kurt J. Lewin
KURT J. LEWIN
Judge of the Superior Court

APPENDIX F

PURCHASE AND ASSUMPTION AGREEMENT

BETWEEN

FEDERAL DEPOSIT INSURANCE CORPORATION
RECEIVER OF FIRST REPUBLICBANK HOUSTON
NATIONAL ASSOCIATION

and

JRB BANK, NATIONAL ASSOCIATION

DATED AS OF

July 29, 1988

PURCHASE AND ASSUMPTION AGREEMENT

THIS AGREEMENT, made and entered into this 29 day of July, 1988, by and between the FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST REPUBLICBANK HOUSTON, NATIONAL ASSOCIATION, HOUSTON, TEXAS, formerly an insured bank within the meaning of the Federal Deposit Insurance Act (12 U.S.C. Section 1811, *et seq.*), organized under the laws of the United States of America (the "Receiver") and JRS Bank, National Association, an insured bank within the meaning of the Federal Deposit Insurance Act, organized and existing under the laws of the United States of America and having its principal place of business in Dallas, Texas (the "Assuming Bank").

WITNESSETH:

WHEREAS, First RepublicBank Houston, National Association, Houston, Texas (the "Failed Bank") has been closed by the Office of the Comptroller of the Cur-

rency (the "Comptroller") pursuant to 12 U.S.C. Section 191; and

WHEREAS, pursuant to 12 U.S.C. Section 191 and Section 1821(c) the Comptroller has appointed the Receiver; and

WHEREAS, pursuant to 12 U.S.C. Section 1821(i), as amended, the Federal Deposit Insurance Corporation (the "Corporation") has caused the Assuming Bank to be organized as a bridge bank upon the determination pursuant to 12 U.S.C., Section 1821(i)(B) and (C) that the continued operation of the Failed Bank is essential to provide adequate banking services in the community where it is located and that the continued operation of the Failed Bank is in the best interest of the depositors of the Failed Bank and the public; and

WHEREAS, pursuant to this Purchase and Assumption Agreement, the Assuming Bank acquires certain assets of, and assumes the deposits and certain other liabilities of, the Failed Bank; and

WHEREAS, pursuant to 12 U.S.C. Section 1823 (c)(2)(A), the Corporation may provided assistance to the Assuming Bank to facilitate the transactions contemplated by this Purchase and Assumption Agreement, which assistance may include indemnification of the Indemnitees (as defined in the Indemnity Agreement, which term includes the Assuming Bank) under the Indemnity Agreement (as hereinafter defined), and indemnification of certain directors, officers and employees of the Assuming Bank under certain Agreements Concerning Indemnity pursuant to 12 U.S.C. Section 1823(c)(2)(A) upon the determination of the Board that any one of the requisite conditions set forth in 12 U.S.C. Section 1823 (c)(4)(A) exists; and

WHEREAS, the Board has determined pursuant to 12 U.S.C. Section 1823(c)(4)(A) that the continued opera-

tion of the Failed Bank is essential to provide adequate banking services in its community; and

WHEREAS, the Corporation has indemnified the Indemnities as provided in the Indemnity Agreement pursuant to 12 U.S.C. Section 1823(c)(2)(A); and

WHEREAS, pursuant to a Contract of Sale of even date herewith by and between the Receiver and the Corporation, the Receiver has sold and assigned certain assets of the Failed Bank to the Corporation.

NOW, THEREFORE, in consideration of the mutual promises herein set forth and other valuable consideration, the Receiver and the Assuming Bank hereby agree as follows:

* * * *

ARTICLE III

PURCHASE OF ASSETS

3.1 *Assets Purchased.* The Assuming Bank hereby accepts from the Receiver an assignment of, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the Receiver in and to all of the following assets of the Failed Bank (which shall be recorded at Book Value), which is based upon the best information available as of Bank Closing and which shall be adjusted as provided in Article VI of this Agreement:

(a) cash and receivables from banks and any accrued interest thereon, including cash items in the process of collection;

(b) securities and any accrued interest thereon;

(c) federal funds sold and securities purchased under agreements to resell, if any, and any accrued interest thereon;

(d) Loans;

(e) Other Real Estate;

(f) credit card plan and other revolving credit plans;

(g) Safe Deposit Boxes and related business;

(h) safekeeping business, if any;

(i) trust business, if any;

(j) Subsidiaries, to the extent of any ownership interest therein;

(k) Owned Bank Premises, subject to leases, if any, of such premises between the Failed Bank and the Federal Reserve Bank of Dallas;

(l) Fixtures owned by the Failed Bank associated with Owned Bank Premises or Leased Bank Premises;

(m) Furniture and Equipment owned by the Failed Bank associated with Owned Bank Premises or Leased Bank Premises;

(n) Records and other documents as provided in Section 7.1 of Article VII of this Agreement; and

(o) any other asset including real property of the Failed Bank, *exclusive* of any

(i) action, judgment or claim of the Receiver against (a) any officer, director, employee, accountant, attorney, or any other Person employed or retained by the Failed Bank on or prior to Bank Closing arising out of any act or omission of such Person in such capacity, (b) any underwriter of financial institution bonds, bankers blanket bonds or any other insurance policy of the Failed Bank, (c) any shareholder or holding company of the Failed Bank or (d) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on an extension of credit from the Failed Bank)

incurred by the Failed Bank; provided, that for purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when any such claim is discovered and regardless of whether any such claim is made with respect to a financial institution bond, bankers blanket bond or other insurance policy of the Failed Bank in force as of Bank Closing;

(ii) Leased Bank Premises, subject to Section 4.4 of Article IV of this Agreement;

(iii) Fixtures and Leasehold Improvements leased by the Failed Bank associated with Leased Bank Premises, subject to Section 4.5 of Article IV of this Agreement;

(iv) Fixtures leased by the Failed Bank associated with Owned Bank Premises, subject to Section 4.5 of Article IV of this Agreement; and

(v) Furniture and Equipment leased by the Failed Bank associated with Leased Bank Premises, subject to Section 4.5 of Article IV of this Agreement, or Owned Bank Premises.

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ARTICLE IV

ASSUMPTION OF CERTAIN DUTIES AND OBLIGATIONS

* * * *

4.7 *Agreement With Respect to Trust Business.* The trust business of the Failed Bank is hereby transferred to the Assuming Bank effective as of Bank Closing.

(a) The Assuming Bank shall, without further transfer, substitution, act or deed, to the full extent permitted by law, succeed to the rights, obligations, properties, as-

sets, investments, deposits, agreements and trusts of the Failed Bank under (i) trusts, executorships, administrations, guardianships, agencies and (ii) other fiduciary or representative capacities, all to the same extent as though the Assuming Bank had originally assumed the same; provided, that any liability based on the malfeasance or nonfeasance of the Failed Bank, its directors, officers, employees or agents with respect to the trust business of the Bank which has not been certified by the Receiver in accordance with Section 2.1(k) of Article II of this Agreement is not assumed hereunder.

(b) The Assuming Bank shall, to the full extent permitted by law, succeed to, and shall be entitled to take and execute, the appointment to all executorships, trusteeships, guardianships and other fiduciary or representative capacities to which the Failed Bank is or may be named in wills, whenever probated, or to which the Failed Bank is or may be named or appointed by any other instrument.

(c) In the event additional proceedings of any kind are necessary to accomplish the transfer of such trust business (including the appointment by any court of the Assuming Bank as successor to the Failed Bank in any fiduciary or representative capacities), the Assuming Bank, at its own expense, agrees that it will take whatever action is necessary to accomplish such transfer. The Receiver agrees to use its reasonable best efforts to assist the Assuming Bank in accomplishing such transfer.

* * * *

13.4 *Governing Law.* This Agreement and the rights and obligations hereunder shall be governed by and construed in accordance with the federal law of the United States of America, and in the absence of controlling federal law, in accordance with the laws of the State of Texas.

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APPENDIX G

PERTINENT STATUTORY PROVISIONS

The Competitive Equality Banking Act of 1987, 101 Stat. 552, 629, amended the Federal Deposit Insurance Act to provide as follows:

> (1) When an insured bank is closed, the [Federal Deposit Insurance] Corporation, in the Corporation's discretion, and subject to the conditions established in (2), may establish a bridge bank to—
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> * * * *
>
> (C) purchase such assets of the closed bank as the [FDIC] may, in its discretion, determine to be appropriate.
>
> * * * *
>
> (3)(A) Upon the organization of a bridge bank pursuant to this subsection, the [FDIC], as receiver * * * may, subject to the approval of any such transfer by a court of competent jurisdiction, transfer any assets and liabilities of the closed insured bank to the bridge bank.

12 U.S.C. §§ 1821(i)(1)(C), (3)(A) (1988), now codified, as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), as 12 U.S.C. §§ 1821(n)(1)(B)(iii), (3)(A) (Supp. III 1991).

Title 31, Section 3713(a)(1) of the United States Code provides as follows:

> A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.